SUMMARY OF ARGUMENT.

(1)

Petitioner's assertion that the evidence **amply sufficed** to make the issue of negligence of respondent and its waiters **acting in the scope of their employment** one for the jury is wholly unsupported by any evidence, **all the evidence on the subject clearly showing that McCampbell and Peyton had ceased to do anything for respondent and were playing for their own amusement alone when they caused the pistol to be fired, fatally wounding Hunter.** The act was completely separated from respondent's work—as completely as if it had been performed by two men who had never been employed by respondent.

Therefore, there was no issue to submit to the jury as to the shooting being done by servants acting in the line of their employment and in the scope of their duty.

(2)

The Supreme Court of Missouri did not find that the act of firing the pistol was committed by McCampbell and Peyton **"while working in the line of their duty and within the scope of their employment"** as asserted by petitioner's counsel in his brief; but that court expressly held (R. 125) that **all the evidence showed that McCampbell and Peyton were not acting in the line of their duty or in the scope of their employment in playing with the pistol, and also that such act did not tend to further respondent's business,** all of which is manifestly true.

The Missouri Supreme Court did not violate the rule requiring appellate courts to give a plaintiff the benefit of all evidence favorable to him and of every reasonable in-

ference in his favor that may reasonably be drawn from the evidence, and to assume that evidence which is favorable to plaintiff is true and to disregard evidence offered by defendant which is unfavorable to plaintiff.

Giving petitioner the full benefit of that rule, there was no issue of fact upon which a verdict in plaintiff's favor could be based, and therefore no issue to submit to the jury.

(3)

There were no facts shown by any evidence tending to prove either actual or constructive notice to respondent that any member of the dining car crew would be—or might be—carrying and playing with a loaded pistol on the night of the accident. There was therefore nothing to give notice that the place to work was unsafe, if it was unsafe.

As to the cook, Hubbard, whatever danger might have existed because of his antique pistol in the kitchen on the night of his quarrel with McCampbell in late December of 1941 or early January of 1942, there had been no possible danger from that source since early in January 1942, **when Hubbard left that dining car and was never thereafter a member of that crew.** That was almost three months before the accident (R. 47). If Hunter's place to work had ever been dangerous or unsafe on account of Hubbard and his pistol (which no evidence tended to show), such menace—real or imaginary—passed away when Hubbard left that dining car crew.

Respondent was not shown to have had actual knowledge of the presence of any pistol anywhere in the dining car until after Hunter was shot, when the train conductor and the steward were notified of the accident.

The only two representatives of respondent to whom notice could have been given were the conductor and the steward, and both of them testified they had never known or heard of a pistol being brought into the dining car before the accident, and they were not contradicted. McCampbell, though recalled in rebuttal, and asked specially if he had ever seen the steward present on any occasion when anyone had a pistol, refused to testify that the steward ever was present (R. 104).

As to pistols that McCampbell claimed were brought in on other occasions, they were not shown to have been loaded, nor to have been handled in play, or displayed in such manner as to threaten danger to anyone.

There was, therefore, neither actual nor constructive notice to respondent of anything that would render the dining car an unsafe place to work at any time. The ruling of the Supreme Court of Missouri on that point was the only ruling that could have been made without utterly disregarding the law and the evidence.

(4)

This point in petitioner's brief is a repetition of what was said in the latter point of his Point (2).

The Supreme Court of Missouri reviewed the evidence exactly as petitioner says it should have reviewed it, and so reviewing it, ruled exactly right.

(5)

There is nothing in the record to indicate that the Supreme Court of Missouri failed to take into consideration the testimony of any witness, as charged by petitioner.

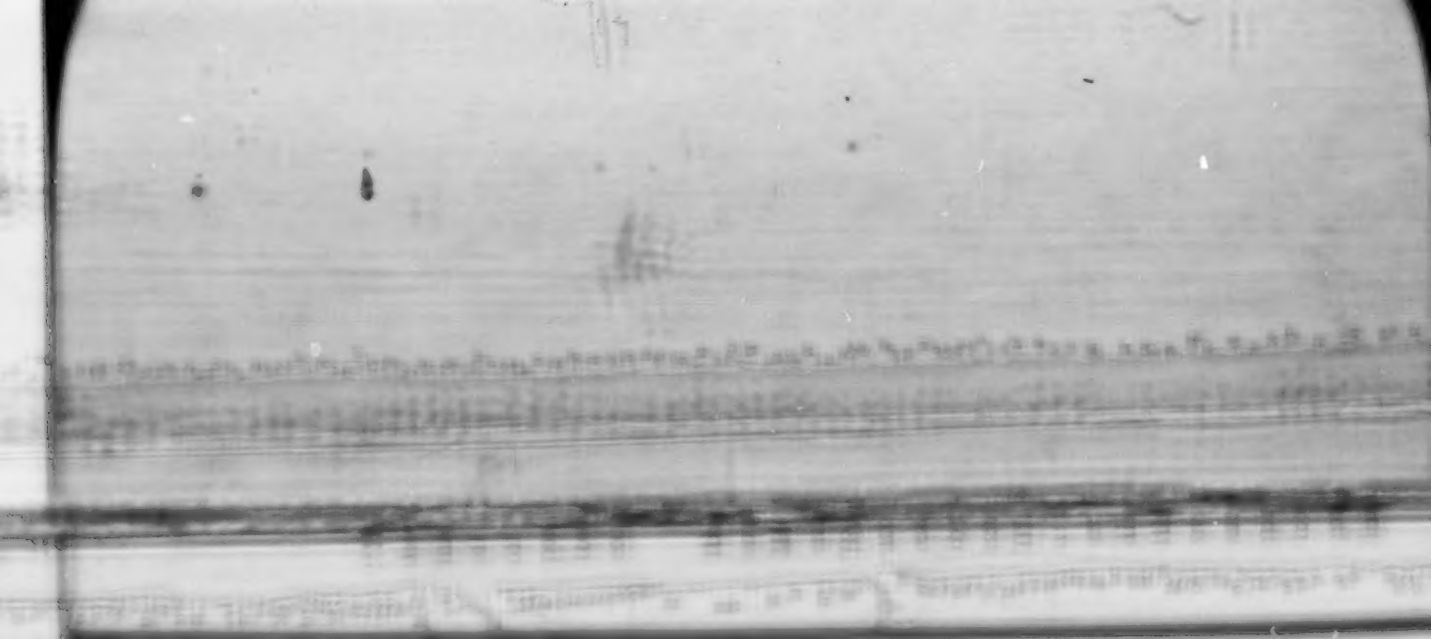
When all the evidence is reviewed, it is found to fall short of revealing anything that tends to show negligence on the part of respondent or any servant acting for it, which in whole or in part caused the fatal injury to Hunter.

(6)

This court on considering all the evidence in the record will find nothing to justify a verdict for petitioner.

(7)

An employer is not obliged to have a vivid imagination and use it to conjure up every possibility of accident of which the human mind can conceive. All he is required to do is to exercise such care and foresight as could reasonably be expected of a reasonably careful employer.



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Supreme Court of the United States

OCTOBER TERM, 1949

No. ____

HENRY D. GREEN, DOING BUSINESS AS GREEN HARVESTER AND IMPLEMENT CO., PETITIONER,

versus

ALLIS-CHALMERS MANUFACTURING CO., RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF

TO THE HONORABLE THE SUPREME COURT OF THE UNITED STATES:

The petition of Henry D. Green, doing business as Green Harvester and Implement Company respectfully shows to the Court:

A. SUMMARY STATEMENT OF MATTER INVOLVED.

This is a petition for a writ of certiorari directed to the United States Court of Appeals for the Fourth Circuit to review a judgment of that Court in this case filed on April 4, 1949. The case was begun on January 4, 1946, in the Richland County, South Carolina, Court of Common Pleas. The jurisdictional amount being sufficient and the parties being resident in different states, the case was removed to the United States District Court for the Eastern District of South Carolina, Columbia Division.

The complaint alleged that the petitioner, plaintiff in the District Court, was a dealer for the Allis-Chalmers Manufacturing Company, hereafter referred to as the company, in Columbia, South Carolina, and vicinity, under a dealership agreement dated December 4, 1944, which terminated November 1, 1945. That by the terms of the contract between the petitioner and the company the petitioner agreed to purchase for resale a sufficient quantity of machinery to meet the trade requirements of his territory and to purchase a sufficient quantity of repair parts to service machinery in his territory and to maintain at all times a sufficient stock of repair parts to service properly the machinery in his territory. That on June 20, 1945, the petitioner placed an order with the company for farm machinery, the cost of which was eight hundred ninety-seven thousand eighty-three and 88/100 ($897,083.88) dollars. That the company failed to fill this order as it was bound to do by the terms of the dealership agreement, to the petitioner's damage in the sum of two hundred thousand ($200,000.00) dollars. (R. 1-4.)

The answer of the company denied liability. The answer alleged that the petitioner's order was not placed in

good faith. That the trade area alloted to the petitioner could not have absorbed so large an order. That the company was under no legal obligation to deliver the machinery ordered in the order. That the machinery was not delivered because of the application of voluntary or compulsory priority ratings and the inability of the company to get materials. (R. 5-9.)

The case was heard first before Honorable C. C. Wyche, U. S. District Judge, and a jury on November 17, 1947, and a mistrial was ordered on November 20, 1947, because of the death of a near relative of a juror.

Next, a pretrial conference was had in the case and Judge George Bell Timmerman issued a pre-trial conference order on February 13, 1948 (R. 9-11), limiting the issues in the case, as therein set forth.

The case was tried before Judge Timmerman and a jury on March 23, 1948.

At the trial of the case the petitioner, who was the plaintiff then, proved by his witnesses that in the early part of 1945, when the final stages of World War II were well under way, the company insisted that the plaintiff build a large new building in view of expected sales and increased business (R. 131, 162), and that in order to handle this increased business the petitioner employed extra salesmen and extra mechanics. (R. 132, 138, 147, 164.) The agent for the company told Mr. Green to "go all out" so as to outsell his competitors. (R. 155, 157, 162.) The petitioner proved that, although the order he sent the company was large, he had prospects to sell every piece of the machinery and could have done so with ease in his alloted territory. (R. 132-133, 142-143, 149-151, 164, 166-167, 168.) This fact was not testified to by only one witness but was testified to by six (6), Henry D. Green, Mrs. Nancy Green,

in that plant a short time before plaintiff's visit. Then one or two other employees, who were in the prank with the watchman suddenly turned off the electric lights, one of them permitted steam to escape, making a terrifying noise, and a scoop shovel was drawn up and down an iron stairway, making a very loud noise. The plaintiff and his companions stampeded like a herd of steers, and, in their hasty flight through the darkness, the plaintiff fell and was badly injured. The Supreme Court of Mississippi said:

> **"The inquiry is not whether the act in question in any case was done, so far as time is concerned, while the servant is engaged in the master's business; nor as to the mode or manner of doing it, whether in doing the act he uses the appliances of the master, but whether, from the nature of the act itself, as actually done, it was an act done in the master's business or wholly disconnected therewith by the servant, not as servant, but as an individual on his own account."**

Holding that the acts complained of were entirely outside of the scope of the employment of the servants in question, the judgment which plaintiff had recovered in the lower court was reversed outright by the Mississippi Supreme Court.

In the case of Bowen v. I. C. R. R. Co., 136 Fed. 306, the U. S. Court of Appeals of the Eighth Circuit held that there was no liability on the part of the railroad in a case involving rather unusual facts.

It appeared that a man named Steagald had for some months prior to the occurrence in question held the position of station agent for the railroad and also that of agent for an express company in a little town in South Dakota. The decedent went into the depot to inquire whether or

not there would be any demurrage on a shipment of a carload of coal if it was unloaded that day. The agent informed him there would be no such demurrage. The business between the decedent and the railroad company ended with that answer, and the decedent turned away to leave the depot, but Steagald called to him that he had a package for him and passed out a book through the ticket window on which the decedent was to sign a receipt. It did not appear whether the package in question was being handled by Steagald as station agent or as express agent. While the decedent was writing his name Steagald suddenly picked up a pistol and shot him, and then came around into the waiting room and shot him again, causing his death almost immediately. The evidence did not show that any argument had occurred or was occurring, and it was a mystery why the agent should shoot the decedent. The U. S. Court of Appeals for the Eighth Circuit held there was no liability, because the evidence failed to show that the shooting was done in order to further the business of the defendant employer. Judge Phillips, who wrote the opinion, cited a large number of cases.

A case very much in point in the case at bar is that of Evers v. Krouse, 58 Atl. Rep. 181 (New Jersey). Suit was brought in that case to recover the value of a horse and wagon. The defendant's minor son had been directed to sprinkle his father's lawn, using a garden hose. The horse had been tied in front of the home next door. The boy thought he saw a chance for some fun, so he turned the hose on the horse, which caused it to break loose and run away, demolishing the wagon and injuring the horse so severely that it had to be killed. A verdict was returned in favor of the plaintiff. The trial court had given this instruction:

> "The boy was engaged in sprinkling the lawn. He was accustomed to doing it. It was his father's lawn.

Was he then in his father's service while he was doing that? Was that his father's business? If he was, then for the misconduct of the boy in the use of the things which he was doing about his father's business the father would be responsible just as if the father himself had done it. So if you find that the boy was in his father's service, and through neglect of ordinary care, or from a mischievous disposition, threw this water upon or over the horse in such a way as was likely to frighten the horse, then both father and son would be responsible."

The appellate court held that that instruction was wrong and reversed the judgment outright.

In the case of Galveston etc. R. R. Co. v. Currie, 96 S. W. (Tex.) 1073, a foreman of a railroad company indulged in foolish horseplay which resulted in killing one of the men in the crew under him.

The place where they were working was equipped with an air hose with very strong pressure, which was used in connection with some of the work the men had to do. While one of the employees had his back to the foreman, the foreman, thinking to have some fun by scaring and making him jump, put the end of the hose close to the seat of employee's pants and turned on the air. It frightened the employee and made him jump and everybody laughed, nobody suspecting that any injury had been caused. But in a few minutes the victim of the prank turned pale and sick, collapsed and was taken to a hospital, where it was found that the compressed air had entered his rectum and ruptured an intestine, which caused him to die of peritonitis.

The Texas court held that the prank was outside of the scope of the foreman's employment, in no wise pertained

to the master's business and did not tend to further it, and that, therefore, there was no liability on the part of the railroad company.

Many cases which support respondent's contention are cited in that opinion on page 1075, in the last column on that page.

The same case is cited in 10 L. R. A. (N. S.) 367, with a good collection of cases in the notes.

In the case of Johnson v. R. R. Co., 141 N. W. 430, 157 Ia. 730, it appeared that a brakeman on a freight train wanted to make a date with a young woman whose house was near the railroad track. The brakeman had charge of torpedoes that were used in giving warning to other trains. He attached a note, addressed to the young lady, to one of the torpedoes and threw it off in front of her home. Her sister found the torpedo with the note and gave it to the girl to whom the note was addressed. The torpedo exploded and injured her.

In a suit by her to recover damages it was held that the act was outside of the scope of the brakeman's employment and there was no liability.

In the case of Sullivan v. L. & N. R. R., 74 S. W. 171 (Ken. Ct. of App.), a member of a switch crew put a torpedo on the track to scare the engineer and the fireman of another crew. One of that crew was injured and sued the railroad, but he was denied recovery because the act of the switchman who tried to scare him was outside of the scope of his employment.

In the case of Texas Breeders and Racing Assn. v. Blanchard, 81 Fed. (2d) 382, a watchman, who was employed on the grounds of the racing association and was required to carry a pistol, was twirling it around his finger

to show a visitor how skillful he was, when the pistol was discharged and wounded a third person, who brought suit against the employer of the watchman. It was held that there was no liability because his act was outside of the scope of his employment.

In the case of Novelty Theatre Co. v. Whitcomb, 47 Colo. 110, 37 L. R. A. (N. S.) 514, a similar ruling was made.

In the case of Priest v. F. W. Woolworth 5 & 10 Cent Store, 62 S. W. (2d) 926, the evidence showed that the plaintiff was a customer in defendant's store in Poplar Bluff, Mo., when the manager of the store, who had an idea that he was a great humorist, walked up to her and pushed her back over a counter, injuring her back on a glass frame that projected above the counter several inches. He did it just in fun, though what would be funny about it is hard to understand. The manager was not attempting to make any sale or collect any bill or do any other act in the furtherance of the defendant's business, but was simply acting as a smart aleck. The manager's name was George. At page 928 the Springfield Court of Appeals said:

> "Plaintiff in this case had committed no act demanding that George should use any violence toward her. She was simply a customer with a perfect right to be there. George, in an act of clowning or buffoonery, committed the assault. He was performing no duty for his employer. He was giving vent to his own whim or pleasure of the moment, which had nothing whatever to do with his employment. Under such circumstances, we think there was no question for the jury and that the trial court should have directed a verdict for defendant."

In the case of Atlantic Coast Line R. R. Co. v. Southwell, 48 Sup. Ct. R. 25, the suit was by the administratrix of one Southwell. She obtained a verdict in the lower

court in North Carolina and the railroad company appealed to the Supreme Court of that State, which affirmed the judgment. The case was then carried to this Court, where the judgment was reversed outright.

As appears from the opinion by Mr. Justice Holmes, the effort of the plaintiff was to hold the railroad company liable for its negligence in permitting and not preventing the murder of the deceased. **The suit was based upon the Federal Employers' Liability Act**, and the question was whether there was any evidence that the death resulted in whole or in part from the negligence of any officer or agent of the railroad.

It appeared from the evidence that the general yardmaster, who was the railroad's vice principal, knew that the decedent on previous occasions had used threatening language toward Dallas, who shot him, and that the yardmaster should have known that they were likely to meet when they did, and that a difficulty was likely to ensue. The yardmaster did not follow the matter up nor take any steps to prevent a difficulty. There was a strike on at the time and Dallas was a special policeman and was armed. The decedent had said to the yardmaster: "Cap, all I want to do is to ask Southwell to lay off of me and let me alone", and the yardmaster replied that he must not see Southwell for if he saw him and talked to him it might bring about unpleasant consequences. The yardmaster saw the two men approaching each other and had taken a few steps towards them with a view to separate them in case of an altercation, but before he had to time to reach them the shot which killed Southwell was fired.

This Court held that there was no liability on the part of the railroad company.

In the case of Sheaf v. M., St. P. & S. S. M. R. R. Co. et al., 162 Fed. (2) 110, **the suit was one under the Federal**

that he was entitled to and gave it to somebody else, then the company would be liable in damages in the amount of the net profit which the plaintiff would have earned on the goods that the company failed to deliver. It was doubtless by reason of this charge that the jury found a verdict for a small sum in the plaintiff's favor.

"In our opinion, this instruction was erroneous" * * * (R. 203; 173 F. (2d) 818, 820), the error being:

(a) That there was no exception made by the Appellant to this charge and therefore the Court of Appeals could not reverse the judgment because of it.

(b) That the charge was a proper one under the law and facts of the case and was made on behalf of the company, the appellant, in the Court of Appeals.

(c) The charge presented a question that it was proper for the jury to decide, and for the Court of Appeals to decide it deprived the petitioner of his right to trial by jury under the Seventh Amendment of the United States Constitution.

D. REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

I

With respect to question (1) and question (2c) presented by this petition it is a matter of grave public concern that this Honorable Court protect the citizens of the United States in their right to trial by jury and to see that that right accorded them by the Seventh Amendment to the United States Constitution is not usurped by the Appellate Courts of this Country. The Court of Appeals for the Fourth Circuit in this decision has taken it upon itself to reweigh the testimony in the case and to determine that the jury did not make a proper finding thereunder. By so doing

the Court of Appeals decided an important question of local law in a way probably in conflict with applicable local decisions and has decided the case in a manner in conflict with the applicable decisions of this Honorable Court and has departed from the accepted and usual course of judicial proceedings so as to call for an exercise of this Court's supervision. In the case of *Lavender v. Kurn et al.*, 327 U. S. 645, 653, 66 S. Ct. 740, this Honorable Court laid down the rule thus:

"It is no answer to say that the jury's verdict involved speculation and conjecture. Whenever facts are in dispute or the evidence is such that fair-minded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference. Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear. But where, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion. And the appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable."

To the same effect is the decision of *Tennant v. Peoria and Pekin Union R. Co.*, 321 U. S. 29, 35, 88 L. Ed. 520, 525.

It is imperative that this court should examine and review this case and see whether the Court of Appeals has not violated this rule so clearly laid down in these two decisions and has not deprived the petitioner of his right to trial by jury. From a mere glance at the record in the case it is clear that there was ample evidence from which the

jury could deduce that the petitioner acted in good faith in placing the order in question and for the Court of Appeals to hold otherwise is to violate the established rules of this Honorable Court.

II A

With respect to question (2a), presented above, we respectfully submit that since there was no exception taken to the Charge of the Trial Judge at the time the charge was given that it was improper for the Court of Appeals to reverse the judgment of the Trial Court on that ground and that in so doing the Court of Appeals decided the case in a manner in conflict with the decisions of other Courts of Appeals on the same matter and has decided a federal question in a way probably in conflict with applicable decisions of this Honorable Court and has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Honorable Court's power of supervision. From a glance at Rule 51 of the Federal Rules of Civil Procedure it is apparant that the Court of Appeals probably erred in reversing the judgment of the lower court on this ground and therefore *certiorari* should issue in this case.

II B

With respect to question (2b) presented above it is respectfully submitted that the charge of the District Judge that the Court of Appeals took exception to and found erroneous was a proper charge and was made at the request and on the part of Allis-Chalmers Mfg. Co. There being no applicable South Carolina law on the subject the federal law would govern. In overruling the judgment of the District Court because of that charge the Court of Appeals rendered a decision in conflict with the decision of the Court of Appeals of the Fourth Circuit itself, in conflict with the

decision of another court of appeals on the same matter, and the Court of Appeals of the Fourth Circuit has decided a federal question in a way probably in conflict with applicable decisions of the Supreme Court of the United States and has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of the supervision of the Supreme Court of the United States.

Wherefore, petitioner prays for the allowance of a writ of *certiorari* to the United States Court of Appeals for the Fourth Circuit in order that this decision may be reviewed and determined by this Honorable Court and that this Court reverse the judgment of the Court of Appeals and direct that the judgment of the District Court in favor of the plaintiff below be reinstated.

Respectfully submitted,

HENRY D. GREEN,
Petitioner.

C. T. GRAYDON,

JOHN GRIMBALL,
Columbia, S. C.,
Attorneys for Petitioner.

June ...., 1949.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

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Supreme Court of the United States

OCTOBER TERM 1949

No. ------

HENRY D. GREEN, DOING BUSINESS AS GREEN HARVESTER AND IMPLEMENT CO., PETITIONER

versus

ALLIS-CHALMERS MANUFACTURING CO., RESPONDENT

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

REFERENCE TO REPORT OF OPINION BELOW

The decision of the District Court is not reported. The opinion of the Court of Appeals for the Fourth Circuit is reported in 173 F. (2d) 818, Advance Sheet No. 6, and in the Record at pp. 199-204.

GROUNDS OF JURISDICTION

This Court has jurisdiction pursuant to Act of June 25, 1948, C.646, Sec. 39, 62 Stat. 992, eff. Sept. 1, 1948, Section 1254, Title 28, United States Code.

As to the bringing of pistols into the dining car by four or five men over a period of something more than a year before the accident, McCampbell alone attempted to cover that question and made a very weak showing.

What time of the day or night did these four or five men have pistols in the car? In what part of the car were they? Were the pistols loaded or empty? Did the men flourish them, play with them or handle them with great care? No answer to any of those questions can be found in the record. The result is that the statement that four or five men brought pistols into the car does not tend to prove that the place where Hunter worked was an unsafe place, nor that respondent could have known of them. Under some circumstances, handled very carefully, pistols would have created no danger in the diner, especially if they were empty. What were the circumstances surrounding the having of the pistols there? The record is entirely silent on all those questions. It does not tend to show that anybody ever played with a pistol in the dining car or ever had one in his hand when pushing, shoving, slapping or goosing anybody, or when others were doing so.

The horseplay, such as pushing, shoving, slapping and goosing was harmless pastime; nobody was ever hurt by it, nor was there any danger attendant upon such harmless play. It did not tend to render the place unsafe for the men to work in, nor to give notice to the respondent of any danger. No matter how many years such harmless play continued, it would still be harmless.

A new element was introduced into the play only a few seconds before the accident, to-wit, playing with a pistol. Of that new element respondent could not possibly have had actual notice, because, as all the evidence shows, no representative of respondent to whom notice would be binding upon respondent, was in the car; and respondent

could not have constructive notice in the few seconds during which the danger existed.

Petitioner's counsel tried to show by McCampbell that the steward had been present on previous occasions when pistols were brought into the car, but that attempt was a flat failure, for McCampbell refused twice to make any such statement (R. 104). Both the steward and the train conductor testified that they had never seen any pistols in the car or heard of any being brought in (R. 58 and 65), and they were not contradicted by anyone.

So we have a case where perfectly harmless playing, which has no tendency to produce injury, is indulged in. Suddenly a real danger appears in an instant, without opportunity on the part of the master to learn of it, and which is brought about by horseplay clear outside of the scope of anybody's employment or line of duty, and having no tendency to further the employer's business. The direct result was Hunter's death.

Nobody could know who was carrying a pistol. A man may carry a pistol for years without anybody discovering it. There certainly was no duty on the part of the respondent to search all the cooks and waiters every time they came into the car.

The safe place to work rule cannot be applied to such a situation as all the evidence reveals here.

Cases Cited by Petitioner Are Not in Point.

On the question of alleged violation of the safe place rule, petitioner relies on three cases, to-wit: Lillie v. Thompson, 332 U. S. 459, 68 S. Ct. 140, 173 Fed. (2) 481; Lavender v. Kurn, 327 U. S. 652, 66 S. Ct. 740, and Wilkerson v. McCarthy, 69 S. Ct. Rep. 413.

A brief review of the facts in each of these cases will demonstrate how entirely unlike the case at bar they are.

In the Lillie case the defendant prepared and furnished to a young woman telegraph operator a place to work through the night in a railroad car in a switching yard, a place infested with the roughest kind of men, both white and black, police characters, tramps, thugs, thieves and robbers—the very scum of the earth. Around the old car in which the young woman was required to work it was dark, no lights being furnished and no guards or railroad police being provided. All these facts were well known to the defendant long before the incident complained of in the case.

It was the duty of the woman operator to open the door when there was a knock, for messages were brought to her by switchmen who knocked upon the door. There was no glass in the door and she could not see who was knocking.

Late one night she heard a knock and opened the door. A big negro man forced his way into the car, seized the young woman, dragged her out into the dark, criminally assaulted her and cruelly beat her. What happened was just what should long have been anticipated by the employer.

Of course this Court held that a petition which stated the above facts stated a cause of action. There the notice of the danger had long been brought home to the employer—in fact the employer had created the dangerous situation.

In the Lavender case the opinion of this court shows that the decedent was required to work in a yard where, by reason of conditions therein, which had long existed, the place where he was required to work was made unsafe and such condition directly contributed to his being killed by a mail hook swinging out from the side of a passing train.

In that case the condition in the yard existed over a long period of time and was plainly visible to anyone passing along there.

In the Wilkerson case the railroad long had knowledge that a narrow walkway was used by switchmen customarily for crossing over a pit and was unsafe because narrow, insecurely fastened in place and greasy.

Here again we find a state of facts of which notice was brought home to the master long before the accident happened.

One more case is cited in petitioner's brief and is claimed to sustain his position, to-wit:

Fletcher v. B. & P. R. R. Co., 168 U. S. 135, 42 Law. Ed. 411.

In that case the evidence showed that a work train gathered up laborers at a certain point in a city and carried them out to the country where they worked as a section gang, tearing out old ties and putting new ones into the track. The railroad had no use for the old ties and made no objection when the section men gathered them up and threw them into cars of the work train which took them back to the city. As the workmen approached their respective homes, they threw some of those old ties out upon the street, and in doing so endangered members of the public who happened to be passing. That was done in daylight with full knowledge of all the train crew and over a long period of time. By and by the inevitable happened—a member of the public was struck and injured by an old tie thrown from the train. He brought suit against the railroad and was permitted to recover, because, although the throwing out of the tie was done by a man who was not then acting in the scope of his employment or the line of his duty, the railroad company had actual notice of the custom and the danger to the public in ample time to have stopped the practice, but neglected to do so.

(5) and (6)

Respondent does not dispute the right of this court to review the entire record in passing upon the case.

(7)

An employer of labor is not obliged to foresee dangers that have never resulted in injury, and that no man on earth by the exercise of ordinary care could foresee.

Nowhere have we found a better statement on this subject than in

Webb's Pollock on Torts (Enlarged American Edition), pp. 45 and 46,

wherein the following statement is made:

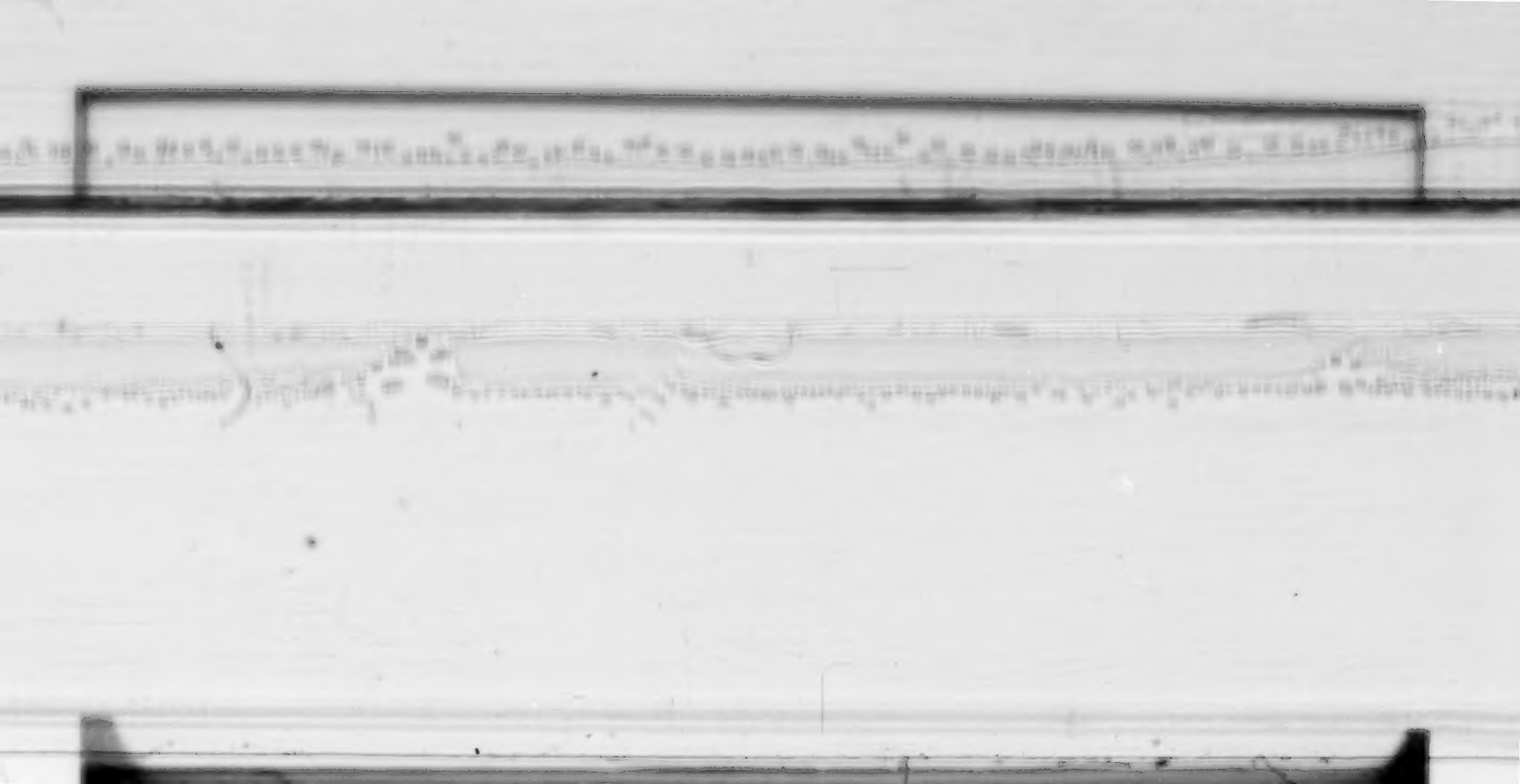
> "Now a reasonable man can be guided only by a reasonable estimate of the probabilities. If men went about to guard themselves against every risk to themselves, or others which might by ingenious conjecture be conceived as possible, human affairs could not be carried on at all. The reasonable man, then, to whose ideal behavior we are to look as the standard of duty, will neither neglect what he can forecast as probable, nor waste his anxiety on events that are barely possible. He will order his precaution by the measure of what appears likely in the known course of things. This being the standard, it follows that if in the particular case (not being within certain special and more stringent rules) the harm complained of is not such as a reasonable man in the defendant's place should have foreseen as likely to happen, there is no wrong and no liability. And the statement proposed, though not positively laid down in Greenland v. Chaplin, 5 Ex. 248, namely, 'that a person is expected to anticipate and guard against all

reasonable consequences, but that he is not, by the law of England, expected to anticipate and guard against that which no reasonable man would expect to occur,' appears to contain the only rule tenable on principle where the liability is founded solely on negligence. 'Mischief which could by no possibility have been foreseen, and which no reasonable person would have anticipated,' may be the ground of legal compensation under some rule of exceptional severity, and such rules, for various reasons, exist; but under an ordinary rule of due care and caution it cannot be taken into account."

In Atchison etc. Ry. v. Calhoun, 213 U. S. 1, this Court referred to the above quotation on page 9 as follows:

"But even where the highest degree of care is demanded still the one from whom it is due is bound to guard only against those occurrences which can reasonably be anticipated by the utmost foresight. It has been well said that 'if men went about to guard themselves against every risk to themselves or others which might by ingenious conjecture be conceived as possible, human affairs could not be carried on at all. The reasonable man, then, to whose ideal behavior we are to look as the standard of duty, will neither neglect what he can forecast as probable, nor waste his anxiety on events that are barely possible. He will order his precaution by the measure of what appears likely in the known course of things.' Pollock on Torts, 8th ed., 41."

The mere fact that the dining car steward had opportunity to learn that the waiters sometimes indulged in slapping, pushing, shoving or goosing each other had no tendency whatever to bring home notice to the master that two waiters, who had never previously engaged in anything that was in the least dangerous to others, would suddenly indulge in the folly of engaging in horseplay with a



Point II

It was error on the part of the Court of Appeals to rule that the District Judge should not have charged the jury that if the company operated a voluntary rationing system it had to be operated fairly and each dealer given his due share or else the company would be liable to the dealer who was treated wrongly in the amount of the net profit the dealer would have earned on the goods that the company failed to deliver, (R. 199-204; 173 F. (2d) 818, 820), the error being that,

(a) No exception was ever taken to this charge, and,

(b) The charge stated a correct proposition of law that was given to explain one of the company's defenses.

A

Rule 51 of the Federal Rules of Civil Procedure provides:

"No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection."

The Court of Appeals for the Fourth Circuit has passed on this question very recently in the case of *Meadows et al v. United States,* 144 F. (2d) 751, 753 and had this to say:

"On the second point, as to the charge of the judge to the jury, the record shows that there was no exception to the charge at the time it was made. Objections to the charge of a trial judge should be called to his attention at the time and if this is not done the objection cannot be raised for the first time on appeal. This rule was laid down by Taft, C. J. in the case of *Brevard Tannin Co. v. J. F. Mosser*

Co. et al., 4 Cir., 288 F. 725, 731. In that case Judge Taft said:

"In the face of this formidable array of authority from the Second, Fifth, Sixth and Ninth Circuit Courts of Appeals, we should be inclinded to hold that the exceptions in this record were not duly reserved and are not properly before us."

"This is, without exception, the rule in federal courts."

Now, if the attorneys for the Allis-Chalmers Mfg. Co., themselves were barred from asking the Court of Appeals for the Fourth Circuit to reverse the judgment of the District Court on these grounds how could the Court itself do the same thing?

The rule stated above is not simply the rule of the Court of Appeals of the Fourth Circuit. This rule is generally adopted by all of the Federal jurisdictions. In addition to this, the Federal Courts that have had an opportunity to pass on the question hold that judicial instructions on a trial that are not objected to become the law of the case. In *Rittgers v. United States,* 8 Cir., 154 F. (2d) 768, 772, the Court said this:

"It is argued by the Government that cohabitation following a marriage contract is not essential to constitute a common law marriage. There would seem at least to be two conclusive answers to this contention. First, it is in the teeth of the explicit instructions of the court heretofore quoted. These instructions were not excepted to by either of the parties and therefore constitute the law of the case."

Since then, the company made no objection to the charge of the District Judge and since it became the law of the case on appeal the Court of Appeals committed error in reversing the judgment of the District Court and that judgment should be reinstated.

B

We submit also that the Court of Appeals should not have reversed the judgment of the District Court on the basis of this charge because it was a proper one. We have been unable to find any South Carolina cases on the subject of pro-rata distribution or voluntary allotment and therefore the federal decisions will be controlling on the subject. In the case of *Acme Mfg. Co. v. Arminius Chemical Co.*, (1920 C. C. A. 4th) 264 Fed. 27, (affirmed on appeal in - (1921 C. C. A. 4th) - 275 Fed. 1021, and writ of *certiorari* denied in (1921) 257 U. S. 647, 66 L. Ed. 415, 42 S. Ct. 55) the Court of Appeals of the Fourth Circuit said that a seller is entitled to the defense of pro-rata deliveries where he finds it impossible, from causes over which he has no control, to fulfill the contract; that in such cases he is required to do the next best thing, to wit, to apportion the amount available among all his customers, giving to each one his ratable share; that this is an exception to the general rule, and is only applied for the relief of any unfortunate seller who has, by conduct, shown that he has in good faith made an honest effort to carry out the provisions of his contract; that, in order to enable a seller to avail himself of this defense, it must appear that he has treated all customers with absolute fairness, and that he has done all that could be expected from one whose purpose is but fair dealing, giving each of his customers the ratable share to which he is entitled under the contract, See also, *Corona Coal Co. v. Hyams Coal Co.*, 9 F. (2d) 361.

Here the Court of Appeals for the Fourth Circuit has stated with approval the same proposition of law as did the District Judge. But says the Court of Appeals that proposition of law is not applicable to the case of *Green, etc. v. Allis-Chalmers, etc.*, because the contract in this case calls for an order to be placed by Green, the petitioner

herein. If that be true, then it was a jury question as to whether or not the order was placed in good faith and it was not within the province of the Court of Appeals to reverse the judgment of the lower court on the ground that the order was not placed in good faith.

However, the company, the appellant before the Court of Appeals, had set up in their pleadings the defense of distribution under a voluntary rationing plan (R. 7-8). The District Judge in his pretrial conference stated that this was one of the defenses interposed to the plaintiff's cause of action by the defendant, the company.

The Honorable Judge said this:

"As matters of defense the defendant claims: (b) that the agreement provided that delays in delivery of goods ordered would be excused if due to causes beyond the defendant's control, such as * * * the voluntary or compulsory application of priority ratings, and delays in * * * getting materials" (R. 10).

Certainly, since the company raised this issue it was proper for the Trial Judge to make a correct charge to the jury on the question. But the Court of Appeals has reversed the decision of the District Court and decided the case in favor of the company because of a correct charge on the law by the District Judge on a question raised by the company as a part of their defense. This is, indeed, an anomolous situation. Never before, at law, has a party lifted itself so high by its own boot straps. The company has caused the District Judge to make a charge to the jury on a question of law raised by its own answer. The Judge has made that charge correctly. Now, the Court of Appeals has reversed the case in favor of the company because the charge was made. Certainly, the company could not have alleged error in their appeal because of the District Judge's charge.

Having caused the case to go to the jury on that theory it was estopped to do so. *Indiana Flooring Co. v. District Nat. Bank of Washington,* 280 F. 522, 51 App. D. C. 391; *Bort v. E. H. McCutchen & Co.,* 187 F. 798, 109 C. C. A. 558; *Grant Storage Battery Co. v. DeLay,* 87 F. (2d) 726; *Kingrey v. New York, C. & St. L. Ry. Co.,* 297 F. 376; *Weinstein v. Studebaker Corp.,* 238 F. 963; *Smith, et al. v. Town of Orangetown et al.,* 150 F. (2d) 782.

It seems to us a most inequitable proposition of law that would allow a court to do for a party to a suit that which the party to the suit is barred to do for himself and thereby decide the case in that party's favor. We respectfully submit that this ruling of the Court of Appeals was erroneous and the judgment of the District Court should be restored.

All of which is respectfully submitted.

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